IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

DON BLANKENSHIP,

Plaintiff,

v. CIVIL ACTION NO. 2:19-00236
(Hon. John T. Copenhaver, Jr., Senior Judge)

HON. ANDREW NAPOLITANO (RET.), *et al.*,

Defendants.

THE *CHARLESTON GAZETTE-MAIL*'s
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Charleston Gazette-Mail hereby moves to dismiss the instant Complaint pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*.

I PRELIMINARY STATEMENT

Plaintiff filed his First Amended Complaint on April 9, 2019. He asserts the many defendants he has sued all engaged in a conspiracy to defame him (Count I) and place him in a false light. (Count II). For the great majority of defendants, including the Charleston Gazette-Mail ("Defendant"),[1] the primary basis of Plaintiff's claim is that each defendant published statements referring to Plaintiff as a "convicted felon," as opposed to stating he was a "convicted criminal." Plaintiff is, in fact, a convicted criminal, who was convicted of a dangerous and

[1]Ironically given his claims, Plaintiff in his First Amended Complaint misidentifies the "The Charleston Gazette-Mail" as the "owner of the Charleston Gazette;" and also misidentifies the name of the newspaper in which the column about which he complains appeared. First Amended Complt. at ¶ 71. HD Media, LLC is the owner of the Charleston Gazette-Mail, which is the correct name of the newspaper in which the column at issue in ¶ 212 of the First Amended Complaint appears.

serious crime in the Southern District of West Virginia, for which he received the maximum sentence and fine. As discussed below, the column published in the Charleston Gazette-Mail complained about in the First Amended Complaint, is not actionable because it is substantially true. Additionally, in a defamation claim, as a public figure, Plaintiff must sufficiently allege (with clear and convincing factual allegations) that Defendant published the column at issue with "actual malice." Plaintiff's First Amended Complaint fails to allege any facts as to the Charleston Gazette-Mail from which a reasonable jury could conclude the column at issue was published with actual malice, or participated in a conspiracy, and therefore the claims should be dismissed for those reasons as well.[2]

II BACKGROUND

Plaintiff Donald L. Blankenship ("Blankenship") is a well-known public figure in West Virginia who for many years has voluntarily and frequently has injected himself into politics and public debates. He was the long-time CEO of Massey Energy Company in 2010 when an explosion at the company's Upper Big Branch coal mine killed twenty-nine (29) coal miners. Following several governmental investigations into that explosion and Massey Energy's safety practices, the federal Mine Safety and Health Administration (MSHA) released its final report on December 6, 2011, concluding flagrant safety violations contributed to a coal dust explosion. It issued 369 citations at that time, assessing $10.8 million in penalties.

On November 13, 2014 the United States filed a criminal indictment against Blankenship alleging criminal conspiracy to violate mine safety standards and SEC fraud charges. *United*

[2]Given the large number of other defendants in this action, the Charleston Gazette-Mail anticipates this Court will receive other motions to dismiss that raise the same legal deficiencies discussed herein, and hereby joins in each of those arguments as well.

States v. Blankenship, No. 5:14-CR-00244 (S.D.W.Va.) (Berger, J.).[3] After a two month trial in 2015, Blankenship was found guilty of the crime of conspiring to willfully violate mine safety standards (a misdemeanor); he was acquitted of two felony counts relating to false statements and omissions to investors and federal securities regulators. He was sentenced to serve one year in federal prison for his crime, to be followed by a year of supervised release. He also was fined $250,000.00. Blankenship appealed his criminal conviction, and his appeals were denied. *United States v. Blankenship*, 846 F.3d 663 (4th Cir.), *cert. denied*, 138 S. Ct. 315 (2017).

At his sentencing hearing, Judge Berger found as follows:

> "The crime is serious. *There's been discussion here about the acquittal of felony offenses and your conviction of a misdemeanor*. Those of us in the legal community put tags on offenses. Congress puts tags on offenses. But **when we seek to sentence someone, we sentence based on the conduct, which I find to be very serious not only in its commission but in its potential impact in terms of risk in this particular case**."

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[3]Prior to trial, Blankenship moved to transfer venue based on his assertion West Virginian jurors were biased and prejudiced against him so much so that he could not receive a fair trial. The Court can and should take notice that Blankenship has argued in this federal court that the Public's perception of him in this district (*i.e.*, his reputation, that he places in issue in this case) already is so low that he could not receive a fair trial. Significantly, in rejecting his motion to transfer, the Court noted Blankenship's direct role in inviting the very public attention he complained about:

> "this Court must "consider the source of that publicity" before presuming prejudice. *Bakker*, 925 F.2d at 733. The Defendant—in earlier motions—pointed the Court to his "documentary" as motivation of the United States for the instant charges. It is uncontested that this video, produced by the Defendant, "invited media attention," and combined with the indictment, created a media spotlight, particularly in light of the Defendant's declarations of innocence and perceived victimization. *Id.* The Fourth Circuit has stated that "a defendant should not be allowed to manipulate the criminal justice system by generating publicity and then using that same publicity to support his claim that the media attention surrounding his case created a presumption of prejudice." *Id.*"

United States v. Blankenship, 2015 WL 5882982, at *2 (S.D.W. Va. 2015).

U.S. v. Blankenship, No. 5:14-CR-00244, ECF No. 589 at 71 (emphasis added).

Following his release from federal prison, Blankenship became a candidate for public office, and ran unsuccessfully in the Republican primary for the United States Senate in West Virginia. Following his electoral defeat, Blankenship apparently explored the possibility of running for the U.S. Senate in the general election as an independent or third party candidate. On May 25, 2018, a contributing columnist to the Charleston Gazette-Mail authored a column supporting Blankenship's right to run in the general election despite the existence of West Virginia's so-called "sore loser" law (a law that generally prohibits those who ran and lost in a primary election from appearing on the ballot in the general election). Ex. A. The column was published on the Daily Mail opinion page of the Charleston Gazette-Mail. *Id.* In the opening sentence of the column supporting Blankenship's right to run for office in the general election, the contributing columnist referred to Blankenship, *inter alia*, as a "convicted felon." *Id.* The following day, on May 26, 2019, the Charleston Gazette-Mail published a correction that stated:

> "A column by Eli Lehrer on the Daily Mail opinion page in Friday's Gazette-Mail incorrectly characterized the criminal conviction of former Massey Energy head Don Blankenship. He was convicted of a misdemeanor."

Ex. B.

III ARGUMENT

A WEST VIRGINIA LAW REQUIRES APPLICATION OF A STRICT STANDARD TO MOTIONS TO DISMISS DEFAMATION CLAIMS

A motion to dismiss filed under Rule 12(b)(6) tests the legal sufficiency of a complaint or pleading. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir.2008). As the Supreme Court reiterated in *Ashcroft v. Iqbal*, that standard "does not require `detailed factual allegations' but `it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 556 U.S.

662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "[A] plaintiff's obligation to provide the `grounds' of his `entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) for the proposition that "on a motion to dismiss, courts `are not bound to accept as true a legal conclusion couched as a factual allegation"). Legal conclusions in a complaint that merely recite the elements of a cause of action supported by conclusory statements cannot be accepted as true. *Iqbal*, 129 S.Ct. at 1949-50. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face." *Id*. at 1949 (quoting *Twombly*, 550 U.S. at 570).

In determining whether a plausible claim exists, a court must undertake a context-specific inquiry, "[b]ut where the well-pleaded facts do not permit the court to infer **more than the mere possibility of misconduct**, the complaint has alleged-but it has not `show[n]'-`that the pleader is entitled to relief.' " *Id.* at 1950 (quoting *Fed.R.Civ.P.* 8(a)(2)) (emphasis added). A complaint must contain enough facts to "nudge[ ][a] claim cross the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

The “line” is stricter still in defamation case brought under West Virginia law. In *Syllabus* Point 3 of *Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778 (1986), the Supreme Court of Appeals of West Virginia held that the First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution require trial courts apply a stricter standard in appraising defamation actions filed by public figures under a motion to dismiss filed

pursuant to Rule 12(b)(6):

> "The First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution require that trial courts apply a stricter standard in appraising defamation actions filed by public officials or public figures under a motion to dismiss filed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Unless the complaint demonstrates on its face sufficient **facts** to support the elements of a defamation action, the complaint should be dismissed under Rule 12(b)(6)."

(Emphasis added).

The First Amendment constitutional protections provided to the Press require courts to apply this more strict standard of review than to other Rule 12(b)(6) motions because of the inherent chilling effect a defamation action has on the First Amendments protections of Free Speech and Freedom of the Press. This stricter standard is necessary to protect the First Amendment rights of defendants and requires the Court to examine not only the law, but also the facts of the case:

> "'Under *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1969), whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law.' Syllabus Point 2, in part, *Mauck v. City of Martinsburg*, 167 W.Va. 332, 280 S.E.2d 216 (1981)."

Id. at *Syllabus* Point 5. As explained by the Supreme Court of Appeals of West Virginia, "[West Virginia] law provides the press very substantial protection from litigation, all in the interest of realizing true 'freedom of the press,' both in theory and in practice." *Chafin v. Gibson*, 213 W. Va. 167, 174 n.8, 578 S.E.2d 361, 368 n.8 (2003). Moreover, "[f]ree speech protections are especially important in this context [of a political campaign] because elections are manifest democracy." *Bell v. Nat'l Republican Cong. Comm.*, 187 F. Supp. 2d 605, 610 (S.D.W. Va. 2002).

B THE WORDS AT ISSUE MUST BE VIEWED IN THE CONTEXT OF THE WHOLE COLUMN

West Virginia law of libel requires the Court to consider the full context of the publications. *Crump v. Beckley Newspapers, Inc.,* 173 W. Va. 699, 716, 320 S.E.2d 70, 87 (1983) ("[I]n a defamation action, a court should not consider words or elements in isolation, but should view them in the context of the whole article[.]" (internal quotation omitted)). *See Tavoulareas v. Piro*, 817 F.2d 762, 818 (D.C. Cir. 1987) (*en banc*) (quotation marks omitted)(the allegedly defamatory statement "must be read in the context of the entire communication as a whole."); *see also Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir. 1993).

In the case at bar, considering the whole column, the words "convicted felon" are incidental to the opinion of the author supporting Plaintiff's right to stand for election to the United States Senate in the general election. The clear purpose of the words in the context of the whole column was to convey Plaintiff had been convicted of a serious crime and was considering continuing his campaign for the United States Senate. In the context of the whole column, those words are "substantially true" because the gist, the sting, of the words would not have a different effect on the mind of the reader from that which the pleaded truth would have produced – that is, in the context of the whole column, whether the words "convicted felon" or "convicted criminal" or "convicted of serious crime," are used, the words would not have a different effect on the mind of the reader. The inaccuracy of the word "felon," as used in the column, is a minor inaccuracy as a matter of law – the technical difference is simply one of being subject to imprisonment for one year, as opposed to being potentially subject to imprisonment for a year and a day. Had Plaintiff been imprisoned a single day longer than his sentence, his crime would receive the label, "felony."

C THE SUBSTANTIAL TRUTH OF THE COLUMN IS AN ABSOLUTE DEFENSE TO PLAINTIFF'S CLAIMS

Under West Virginia law, the elements of a defamation claim are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) fault; and (6) resulting injury. *Crump v. Beckley Newspapers, Inc*., 320 S.E. 2d 70, 77 (W. Va. 1983). As to the element of "falsity," under West Virginia law, the substantial truth of a published statement is an absolute defense to a defamation claim. *Kinney v. Daniels*, 574 F. Supp. 542, 546 (S.D.W. Va. 1983) ("'substantial truth' constitutes an absolute defense in a civil libel action brought by a public official in West Virginia." See *Dostert v. Washington Post Company*, 531 F.Supp. 165, 168 n. 9 (N.D.W.Va.1982), *citing Sprouse v. Clay Communication, Inc*., 211 S.E.2d 674 (W.Va.) cert. denied, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975).").

As explained in *Syllabus* Point 4, *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 342, 480 S.E.2d 548, 551 (1996):

> "The law of libel takes but one approach to the question of falsity, regardless of the form of the communication. It overlooks minor inaccuracies and concentrates upon substantial truth. Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. A statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced."

Importantly, "a 'statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced."' *Id.* Generally, this 'inures to the benefit of the accused, *i.e.* if something is "substantially" true in overall effect, minor inaccuracies or falsities will not create falsity.' *Matter of Callaghan*, 238 W.Va. 495, 796 S.E.2d 604, 628 (2017)." *Ballengee v. CBS Broad., Inc*., 331 F. Supp. 3d 533, 546 (S.D.W. Va. 2018). *See Kostenko v. CBS Evening News*, 265 F. Supp. 3d 672, 680 (S.D.W. Va. 2017):

> "[I]ncorrect quotations that "effect[ ] no material change in meaning, including any meaning conveyed by the manner or fact of expression" do not cause "injury to reputation that is compensable as a defamation." *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496, 516, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). In short, a "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' " *Id.* at 517, 111 S.Ct. 2419 (quoting R. Sack, *Libel, Slander, and Related Problems* 138 (1980))."

The doctrine of substantial truth applies to the Charleston Gazette-Mail's publication at issue herein. As noted above, when he was sentenced, Judge Berger discussed on the record the seriousness of Plaintiff's crime, regardless of whether it was labeled as a felony or not.[4] Plaintiff is alleging as a basis for his claims that the term "convicted felon" conveys a meaning different from the truth, that being that he was convicted and sentenced for a crime that was, "very serious not only in its commission but in its potential impact in terms of risk[.]" *U.S. v. Blankenship*, No. 5:14-CR-00244, ECF No. 589 at 71. There is no difference in the gist or sting of generically identifying Plaintiff as a convicted felon or stating, in the words of Judge Berger, that he was convicted and sentenced for a crime that was, "very serious not only in its commission but in its potential impact in terms of risk." Thus, the column's passing reference to Plaintiff as a convicted felon is substantially true.

Additionally, if Plaintiff served one more day in prison, a minor difference, it would have been the same sentence as available for a felony. There is no discernible difference to the gist or sting of what was published if the accurate phrases "convicted criminal" or "convicted of a

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[4]Plaintiff would be classified as a felon if he had been in prison one day longer than he served. *See U.S. v. Amaya-Portillo*, 423 F.3d 427, 431 (4th Cir. 2005) ("'felony' means any federal, state, or local offense punishable by imprisonment of a term exceeding one year" and a "misdemeanor [i]s any federal, state, or local offense punishable by a term of imprisonment of one year or less.").

serious crime," were used in place of "convicted felon." Moreover, courts in other jurisdictions hold that technical errors in labeling a crime do not give rise to substantial falsity to support a defamation claim. See, e.g., *Dostert v. Washington Post Co.*, 531 F. Supp. 165, 167-168 (N.D.W. Va. 1982); *Nanji v. Nat'l Geographic Soc'y*, 403 F. Supp. 2d 425, 432 (D. Md. 2005); *Hahn v. City of Kenner,* 984 F. Supp. 436, 441 (E.D. La. 1997); *Brewer v. Dungan*, 1993 WL 441306, at *1 (N.C. Super. Ct. June 30, 1993); *Tiwari v. NBC Universal, Inc*., 2011 WL 5079505, at *15 (N.D. Cal. Oct. 25, 2011). Therefore, because for all of the reasons stated above, the column was substantially true, Plaintiff has failed to state a claim for defamation against the Charleston Gazette-Mail.

D PLAINTIFF IS A "PUBLIC FIGURE"

It is beyond cavil that Plaintiff, whether through his regular and extensive voluntary participation in West Virginia politics over the course of many years, or his own arguments during his criminal proceedings as to why his criminal case should be transferred, or by virtue of his candidacy for high political office, or by virtue of his self-description in the First Amended Complaint, is a public figure. Indeed, Plaintiff previously described himself to this Court as "one of the most outspoken, recognizable, and controversial figures in [West Virginia]." *United States v. Blankenship*, No. 5:14-CR-00244, 2015 WL 1565675, at *5 (S.D.W. Va. Apr. 8, 2015). His claims therefore are governed by the stringent rules restricting defamation and related claims by pubic officials and public figures, including the requirement of alleging and proving actual malice and an intent to harm by clear and convincing facts.

"A candidate for political office is governed by the same stringent rules with regard to recovery as a public official. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d

35 (1970). In order for a political candidate to recover for libel against a newspaper it is necessary that the candidate prove actual malice[.]" *Sprouse v. Clay Commc'n, Inc*., 158 W. Va. 427, 432-33, 211 S.E.2d 674, 681 (1975). "[T]he law makes it difficult for public figures, such as political candidates, to prevail in defamation suits. Requiring them to prove that a defendant acted with actual malice encourages people to comment freely on high-profile figures-who have invited attention and comment and assumed some risk of injury from defamation-without fear of liability for accidentally defamatory statements. *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 344, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (citations omitted)." *Bell v. Nat'l Republican Cong. Comm*., 187 F. Supp. 2d 605, 610 (S.D.W. Va. 2002). Based upon the foregoing, it is clear Plaintiff is a "public figure" for the purpose of his claims, and in his Amended Complaint, he so concedes. Am. Compl. ¶ 19. As a public figure, Plaintiff must plead facts sufficient to support the factual elements of a defamation claim, including, *inter alia*, "actual malice" and an intent to harm him through a falsehood. Plaintiff's Amended Complaint fails to plead any facts that would support those elements of his claims, and dismissal is justified.

E PLAINTIFF'S FAILURE TO PLEAD FACTS SUPPORTING ACTUAL MALICE

Because Plaintiff is a "public figure," he must both sufficiently allege and prove facts showing actual malice to succeed on his claims against Defendant. As explained by the Supreme Court of the United States in *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496, 510, 111 S. Ct. 2419, 2429, 115 L. Ed. 2d 447 (1991),

> "When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Mere

> negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or acted with a "high degree of awareness of ... probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964)."

As noted above, defamation and related claims made by public officials must be reviewed by the Court pursuant to a "stricter standard" than the standard of review usually employed on a Rule 12(b)(6) motion. Under that standard, public figure defamation plaintiffs also must allege and prove facts amounting to "actual malice" on the part of the defendant, and such facts must be proved by clear and convincing evidence. In this regard, the West Virginia Supreme Court of Appeals held in *Dixon v. Ogden Newspapers, Inc*., 187 W.Va. 120, 416 S.E.2d 237, 241 (1992), that where a defendant's First Amendment rights are implicated, the court independently must review both the law and facts for a "clear and convincing" showing of "actual malice":

> "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'

Id., quoting *Bose Corp. v. Consumers Union of United States, Inc*., 466 U.S. 485, 511, 104 S.Ct. 1949, 1965, 80 L.Ed.2d 502, 523 (1984).

In regard to the "actual malice" that must be pled sufficiently by a public figure in a defamation case, allegations of actual malice, like all other material allegations, may not be pled in conclusory terms. Actual malice requires a showing by clear and convincing evidence that the allegedly defamatory statement "was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 342 (1974) (private figure

analysis); *Besen*, 2012 WL 1440183, at *5 (limited-purpose public figure analysis); see *Jordan*, 612 S.E.2d at 207 (public figure analysis). While actual malice may be alleged "generally," the Fourth Circuit does not permit "conclusory allegation[s]" of malicious intent to survive on a motion to dismiss. *Mayfield*, 674 F.3d at 377-78 (public figure analysis); see also *Besen*, 2012 WL 1440183, at *6 (citing cases) (limited-purpose public figure analysis).

A public figure plaintiff may not simply plead that a defendant acted with actual malice without stating the factual allegations from which a jury reasonably could conclude that such conduct was malicious. As stated in *Hall v. Bellmon*, 935 F.2d 1106, 1113-14 (10th Cir. 1991):

> "Although plaintiff need not allege every element of his action in specific detail, *Conley*, 355 U.S. at 47, 78 S.Ct. at 102-03, he cannot rely on conclusory allegations, *Dunn*, 880 F.2d at 1197; *Sooner Products*, 708 F.2d at 512; *Clulow*, 700 F.2d at 1303; *Wise,* 666 F.2d at 1333; *Lorraine*, 444 F.2d at 2. Plaintiff's mere words 'with malous [sic] and forthougth [sic]' are insufficient without any facts to support the conclusion. Plaintiff has not even presented his theory as to why defendants would intentionally destroy his property."

See *Michel v. NYP Holdings, Inc*., 816 F.3d 686, 704 (11th Cir. 2016); *Biro v. Conde Nast*, 807 F.3d 541, 546 (2d Cir. 2015); *Schatz v. Republican State Leadership Comm*., 669 F.3d 50, 58 (1st Cir. 2012).

In this case, Plaintiff failed to plead a factual basis of an essential element of defamation, that is, actual malice. His averments in regard to actual malice are made in conclusory terms, Amended Complaint at ¶¶ 229, 232, and 243, and has not pleaded any factual allegations from which a reasonable jury could conclude by clear and convincing evidence that the statements were published with intent to harm the Plaintiffs.[5] *Id.* Thus, pursuant to the *Iqbal/Twombly* line

[5]Plaintiff seems to take the position all defendants could have discovered Blankenship's conviction was for a misdemeanor if they had looked to the public record, and that they should have done so. *Masson, supra*, 501 U.S. at 510 ("Mere negligence does not suffice."). Such an

of cases, Plaintiff's bald and conclusory boiler-plate allegations of actual malice and intent to harm are woefully deficient to withstand the instant motion, and likewise are insufficient to withstand scrutiny under West Virginia's "stricter standard" required by *Long v. Egnor, supra*. *See Mayfield v. National Association for Stock Car Auto Racing, Inc*., 674 F.3d 369, 377-378 (4th Cir. 2012). Pursuant to the "stricter standard" employed upon a Rule 12(b)(6) motion in regard to a public official defamation claim, the Plaintiff must present in the Complaint of "sufficient *facts*" from which a jury could conclude **all** of the elements of the claim could be proved by clear and convincing evidence. *Id.* This Plaintiff has failed to do.

As a component of "actual malice," a public figure plaintiff also must plead sufficient facts from which a reasonable jury could find, by clear and convincing evidence, that "the publisher **intended to injure** the plaintiff through the knowing or reckless publication of the alleged libelous material." *Long v. Egnor, supra*. (emphasis added). In *State ex rel. Suriano,* 198 W.Va. at 354, 480 S.E.2d at 563, our state Supreme Court held that such a plaintiff, "must prove, by clear and convincing proof, an 'intent to inflict harm through falsehood.' *Henry v. Collins*, 380 U.S. 356, 357, 85 S.Ct. 992, 993, 13 L.Ed.2d 892, 893 (1965) (per curiam)." Nowhere in the Complaint are any facts alleged from which a jury could conclude the Charleston Gazette-Mail "intended to harm" the Plaintiff, and a reading of the column shows that the author,

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allegation is insufficient to support a claim for actionable "actual malice." This is because, to sufficiently allege actionable "actual malice," facts must be alleged showing a defendant's subjective, actual state of mind at the time of publication, and is "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731; *Harte-Hanks Commc'ns*, 491 U.S. at 666 ("public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule"). No such allegations appear in Plaintiff's Amended Complaint for the obvious reason that no basis exists to so state.

directly contrary from intending to harm Plaintiff, clearly and unequivocally was supporting Plaintiff's right to stand for election in the general election. Generally alleging "malice" or an "intent to harm," as Plaintiff has here, especially in the face of the overwhelmingly clear message and context of the column *supporting* Plaintiff, can not colorably be considered "facts," rather, they are legal standards or labels stated in conclusory terms. At best, all Plaintiff has done is aver legal conclusions, with no facts to support those assertions. Because the instant defamation claims are made by a public figure, applying West Virginia law to Plaintiff's claims against Defendant, he has failed to plead sufficient facts supporting his claims, and therefore his claims against the Charleston Gazette-Mail should be dismissed for failure to state a claim.

F THE FALSE LIGHT CLAIM FAILS FOR THE SAME REASON THE DEFAMATION CLAIM FAILS

Plaintiff's false light claim fails for the same reason the defamation claim fails. If a plaintiff fails, as here, to allege facts sufficient to state a claim for defamation, a claim for false light will fail as well. This is so because false light claims are subject to the same First Amendment defenses as defamation claims. *Snyder v. Phelps*, 580 F.3d 206, 217–18 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011)("[R]egardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech[]"), and "courts and commentators have consistently treated false light privacy claims in essentially the same manner as they have treated defamation," *Crump*, 320 S.E.2d 70 at 87. *See Ballengee*, 331 F. Supp. 3d at 553-554 (defamation and false light claims require overlapping essential elements); *Chafin v. Gibson*, 213 W.Va. 167, 170 n.3 (W.Va. 2003). Moreover, the false light claim as pled in the Amended Complaint is stated in conclusory terms. As such, it is nothing more than the "mere recitation of

[a] legal standard" that the Fourth Circuit holds is insufficient to survive a motion to dismiss. *See Mayfield*, 674 F.3d at 377-378.[6] Like Plaintiff's defamation claim, the false light cause of action does not state a claim upon which relief can be granted, and should be dismissed.

IV CONCLUSION

For all of the foregoing reasons, the claims alleged in the Amended Complaint against the Charleston Gazette-Mail should be dismissed.

CHARLESTON GAZETTE-MAIL,
----------By Counsel----------

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[6]Per West Virginia law, an essential element of a false light claim is that the plaintiff be placed in a false light "'highly offensive to a reasonable person.'" *Taylor v. W. Va. Dep't of Health & Human Res*., 788 S.E.2d 295, 315-16 (W. Va. 2016). The difference in nomenclature between identifying Blankenship as a convicted criminal or a convicted felon, for a crime Judge Berger stated was "dangerous" and "very serious," hardly can be said to be "highly offensive to a reasonable person" as a matter of law.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, hereby certify that on this 16th day of August, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants, including:

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